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CHRISTOPHER BRIGGS,)	
)	Supreme Court Case No. 39215
Petitioner-Appellant,)	Ada County Docket: 2009-9841
)	
v.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT,
IN AND FOR THE COUNTY OF ADA**

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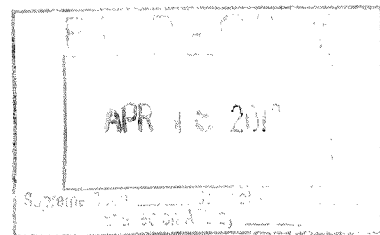


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FACTS AND PROCEDURAL BACKGROUND

Christopher Briggs was charged with Stalking in the Second Degree, misdemeanor, a violation of Idaho Code 18-7906. The matter was charged by way of citation. R., p. 6. The court appointed counsel and the matter proceeded to trial. On the day of trial, and without advance notice to defense counsel or the court, the State of Idaho filed a formal criminal complaint at trial charging Stalking in Second Degree, as follows:

COUNT 1: STALKING IN THE SECOND DEGREE, I.C. 18- 7906, said crime being committed as follows to wit:

That the Defendant, Christopher D. Briggs, on or about the 1st day of April, 2009, through the 1st day of June, 2009, in the City of Garden City, County of Ada, State of Idaho, did knowingly and maliciously engage in a course of conduct that seriously alarmed, annoyed or harassed Cassandra Menear, which would cause a reasonable person substantial emotional distress, and/or engage in a course of conduct that would cause a reasonable person to be in fear of death or physical injury, to wit: committed the following repeated acts of nonconsensual contact: repeatedly e-mailed, telephoned or texted Cassandra Menear and/or other people who would have knowledge of her whereabouts and/or reported Cassandra Menear as a missing person and/or refused to leave the premises when he appeared at Cassandra Menear's residence and/or yelled threats outside Cassandra Menear's residence and/or used Cassandra Menear's cell phone's GPS feature to follow her movements, in violation of Idaho Code 18-7906. R., p. 82.

The defense did not object to the late filing of this complaint; the matter proceeded to jury trial on December 10, 2010.

The evidence at trial established that Briggs and the victim Cassie Menear lived together in a romantic relationship until the time of their breakup sometime at the end of May, 2009. According to Cassie, Briggs was upset with the breakup and wanted to get back together. She testified that the last conversation was emotional, but uneventful:

CASSIE: The conversation -- the last conversation we had was the day that I was trying to get my phone from him. And we were talking, and it was about why it couldn't work. And I was giving him my reasons. And he was trying to pursue getting back together. And I let him know that wasn't an option." Tr. p. 77, ll 1-8.

Cassie testified on direct that Briggs was angry and upset at the breakup, but there was no evidence introduced at trial that Briggs directly threatened her at this time or any other time, on the phone, email, by text, or in any manner. Cassie did testify to her belief that friends had received texts "asking them if they knew where I was, telling them about our relationship, threatening, things like that." Tr. p. 50, ll. Without objection from the defense the prosecutor followed up and elicited this highly prejudicial and unsubstantiated hearsay:

Q. Threatening, like what kind of threats?

A. Harm, just if they knew where I was that -- and that if they didn't tell him that they would be hurt.

Q. Oh, so Mr. Briggs is telling them that if they didn't say where you were that they would be -- that he would hurt them?

A. Yes, if they knew and they didn't say, that they would be --- Tr. p. 50, ll. 9-19.

This hearsay was not corroborated by a single document or the testimony from any witness at trial. Two witnesses were called by the State with regard to third party contacts: Michael Minear testified that Briggs contacted him and asked if he had seen her. Tr. p. 93, ll. 4-5; Stephanie Howard testified that Briggs sent her between 20 and 25 text messages in the week after the break up inquiring if Stephanie knew where Cassie staying. Tr. pp. 100-101. Briggs also testified that he did text Stephanie Howard on one occasion and that the text messages were part of an ongoing conversation. Tr. p. 151, ll. 13-25. Briggs testified that he was concerned about Cassie's whereabouts and filed a missing person's report on the day that he was arrested. Tr. p. 160, ll. 10-21.

The only contact between Cassie and Briggs occurred on June 1, 2009 when Briggs showed up at the trailer of Crystal Halisel and yelled for 17 year old James Dobson to come out and fight. Briggs testified on direct that the break up occurred the day before and that he called Crystal Halisel's phone to try and get in touch with her but not one answered. Tr. p. 143, ll. 10-11. James Dobson called him back on the cell phone and called Briggs "a punk" while threatening to "shoot" Briggs. Tr. p. 143, ll. 13-16. Briggs went over to call Dobson out for a fight. Briggs did not bring a weapon. Tr. p. 148 ll. 16-18.

When Briggs arrived at Halisel's garden city trailer he called Dobson to come out but Dobson had already left. Briggs yelled to his ex-girlfriend Cassie to "come out and get the phone" [that belonged to her and Briggs]. Tr. p. 60, ll.

14-17. Cassie testified at trial that she was scared of Briggs and thought he was going to harm her if she left the trailer. She did not leave the trailer. Garden City Police responded and arrested Briggs. Briggs denied ever threatening Dobson with a weapon; Briggs was not in possession of a gun. Tr. p. 148, ll. 16-23.

Other than this single event, the evidence at trial consisted of inadmissible comment on evidence that was never admitted, hearsay, and evidence of speech that was constitutionally protected activity. Highlights of the evidence and comments include:

The GPS Tracking Device. Cassie testified that she and Briggs shared a cell phone and that Briggs had activated a GPS feature that allowed Briggs to track the phone and presumably the whereabouts of Cassie. Tr. p. 43. Cassie did not have this phone with her at any time after the break up, but this evidence was presented to suggest that Briggs was a dangerous stalker. The jury was instructed under Instruction No. 13. that “nonconsensual contact” included “following the victim or maintaining surveillance, including by electronic means, on the victim.” Many of today’s cell phones contain GPS features that allow the owner to locate the phone remotely.

Questions and comments about a gun. Immediately following Cassie’s testimony regarding the breakup, the prosecuting attorney questioned Cassie about Briggs having “access to a gun.” Tr. p. 47 ll 12-16. Although Cassie testified that she never saw Briggs with a gun, nor were any threats ever made,

the questioning clearly established that Briggs had “access to a gun.” This created the dangerous suggestion that Briggs was a violent man capable of using the gun at any moment. Why the defense attorney did not object to this line of questioning is unknown, but no objection was forthcoming in a very damaging line of questioning regarding activity that was protected by the Second Amendment of the Constitution. Tr. p. 46-48.

Emails. The criminal complaint charges Briggs with harassing the victim by email. No such emails were admitted at trial. Although the prosecution attempted to introduce two emails that the victim brought to court with her (supposedly from Briggs) the court properly rejected this evidence. Nonetheless Briggs’s conviction was based upon the repeated argument of the prosecuting argument in closing that Briggs was sending “electronic communications to the victim.” The prosecution refers to “emails, the phone calls, the texts, the My Space looking for her” Tr. p. 197, ll. 18-21. The prosecution states that “he sent all kinds of email, six out of seven in just four days or so.” Tr. p. 190, ll. 9-12. The jury was never informed that written nonthreatening communications are constitutionally protected free speech. The record is devoid of any instruction on the First Amendment in this case.

Text Messages. Witnesses Stephanie Howard and Michael Menear testified that Briggs attempted to contact them, or did contact them, by phone or text message with an inquiry as to Cassie’s whereabouts shortly after the

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breakup. No threats were made by the defendant Briggs to either witness.

Idaho Code 18-7906 does not prohibit any communications made between a defendant and third parties. Such communications may also be protected as free speech in the absence of threats or true intimidation.

Attempting to contact the victim by phone. There is no evidence in the record that Briggs contacted Cassie after the break on a telephone. Briggs was in possession of the jointly owned cell phone and didn't have Cassie's telephone number. Although Briggs testified that he did try to contact Cassie through a friend, he did so for a legitimate purpose. Tr. 141-143. Nonetheless the prosecution argued, and the court accepted, the proposition that Briggs used the telephone to stalk Cassie.

THE JURY INSTRUCTIONS

At trial the the magistrate court gave an improper jury instruction which improperly defined "course of conduct" under the Stalking Law.

Instruction No. 12. read:

In order for the defendant to be guilty of Stalking, the state must prove each of the following:

1. on or about April 1 2009 to June 1, 2009
2. in the state of Idaho
3. the defendant Christopher Briggs
4. knowingly and maliciously engaged in a course of conduct that seriously alarmed, annoyed, or harassed Cassandra

Menear, and was such as would cause a reasonable person substantial emotional distress, OR

5. engaged in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family member.

If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty. If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. R., p. 75.

Instruction No. 12 does not contain the mens rea element of “knowingly and maliciously” engaging in conduct that would cause a reasonable fear of injury or death. The major problem, however, came with Instruction No. 13 in which the court instructed the jury under and old pattern instruction that:

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Course of conduct does not include constitutionally protected activity. R., p. 76.

Under the old law and old pattern instructions a “course of conduct” was defined as “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.” Under the revised statute of 2004, a “course of conduct” was defined as **“repeated acts of nonconsensual contact involving the victim or household member of the victim”** provided that **“constitutionally protected activity is not included in this definition.”** I.C. 18-7906.

Neither version of the statute defines constitutionally protected activity such as the right of free speech or freedom of association as guaranteed by the First Amendment of the United States Constitution or under the protections of Article 1, Section 9 of the Idaho Constitution. The court gave no jury instruction at all in this regard.

Although neither counsel initially objected to the improper jury instructions, the court recognized error during closing argument but did not inform counsel of the problem until after the jury reached a verdict. Magistrate Judge Watkins then informed counsel that the “course of conduct” instruction he gave under the old pattern instructions “is not the language that tracks with the statute as the statute was amended.” Tr. p. 203, ll 23 - 25. The magistrate acknowledged that it was “concerned about the instruction” but scheduled the matter for a post trial motion hearing. (Tr. p. 204, ll. 15-16). Briggs was found guilty by the jury.

The court then polled the jury:

THE COURT: Mr. Koontz, is this your true and accurate verdict?

MR. KOONTZ: Based upon the instructions we were given, yes. Tr.,p. 202.

The court noted that it believed Mr. Koontz’ comment was troubling in light of the instructions given. Tr. p. 204, ll 22-25. Nonetheless, and despite the court’s stated concern that the jury had may have been mislead, Judge Watkins

later denied a written motion for a mistrial. Memorandum Decision of April 14, 2010. R. 113.

The record is clear that the State of Idaho made its argument for conviction based upon error in law and substantial infringement on constitutionally protected speech:

PROSECUTOR: "Well, what's a course of conduct? Well thankfully we have some definitions. Court of conduct you're going to find out is a pattern of conduct, series of acts over a period of time, however short. In this particular instance, the period of time is alleged as April through June. But if you think, well, it kind of more or less occurred at the end of May through June 1st, that's fine. You can still find him guilty of that. It just has to have happened on or between April and June, 1st. Okay. Course of conduct, however short, a continued continuity of purpose. In this particular case the continuity of purpose is, of course, he is trying to find Case. He's making these phone calls, these texts, these messages on various like My Space account type things for a purpose, and that is to find Cassie." Tr. p. 180, ll. 4 -19.

In denying the written motion for mistrial, the magistrate recognized that it had committed error in the instructions, and that this error was "fundamental error." R. 113, Memorandum Decision, at p. 4. Nonetheless, the magistrate court ruled that the error was harmless based upon the theory that the State had proven its case through a series of "nonconsensual contacts" between the defendant and the victim. The magistrate did not engage in any evaluation of whether such contacts might be protected as free speech under the First Amendment or under Article 1, Section 9 of the Idaho Constitution.

On appeal the district court affirmed the decision of the magistrate court.
APPELLANT'S BRIEF -9-

ISSUES ON APPEAL

1. Did the magistrate court improperly instruct and mislead the jury as to the elements of the crime?
2. Were the jury instructions so fundamentally flawed to deprive Briggs of a fair trial without the protections afforded by the First Amendment of the United States Constitution and Article 1, Section 9 of the Idaho Constitution?

ARGUMENT

I.

The magistrate court improperly instructed and mislead the jury as to the elements of the crime.

A. Introduction.

In this case the magistrate recognized error in the instruction while the jury was deliberating. The court brought this to the attention of counsel and the defense moved for a mistrial. This motion was not granted and the jury found the defendant Briggs guilty of Stalking in the Second Degree, a misdemeanor under Idaho law. The court then set the matter for a hearing on the motion for mistrial and allowed both parties the opportunity for briefing.

In its Memorandum Decision of April 14, 2010 the magistrate held that Briggs was denied due process of law:

While the jury was correctly instructed that they had to find a "course of conduct" that caused the required harm, they were not instructed that at "course of conduct" must be composed of certain "nonconsensual contact." This was not the correct manner in which to instruct the jury.

For purposes of this decision, the court will assume that if an error occurred in the instructions, that such an error would be fundamental. If a material element was left out of the instructions, then Briggs was certainly deprived of due process. However, even when a fundamental error has occurred, a new trial is unwarranted if the fundamental error was harmless. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007). In deciding whether error was harmless, the Supreme Court suggested that the question is "whether there is a reasonable possibility that the evidence complained of might have

contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed. 2d 705, 710 (1967). R. p. 116.

The magistrate then wrongly concluded that such error was harmless because the State had only proven conduct that would be nonconsensual and illegal under the current law. The magistrate concluded that "all of the acts that the state alleged, and upon which they presented evidence, fall into the category of 'nonconsensual acts'." R., p. 117.

B. Standard of Review.

In *State v. Adamick*, 2012 Opinion No. 23, the Idaho Supreme Court articulated the standard for reversible error with regard to jury instructions:

The issue of whether a particular jury instruction is necessary and whether the jury has been properly instructed is a matter of law over which this Court exercises free review. This Court reviews jury instructions to ascertain whether, when considered as a whole, they fairly and adequately present the issues and state the applicable law. (internal citations omitted).

No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection." *Idaho Crim. R.* 30(b). When a defendant has objected to an instruction, we will apply the harmless error test articulated in *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, (2010). Typically, under the harmless error test, once the defendant shows that a constitutional violation occurred, the State has the burden of demonstrating beyond a reasonable doubt that the violation did not contribute to the jury's verdict. *Id.* If the jury reached its verdict based on an erroneous instruction, we will generally vacate and remand for a new trial. *Id.* at 228, 245 P.3d at 980. However, where the jury received proper instruction on all but one element of an offense, and where the Court "concludes beyond a reasonable doubt that the omitted

element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.*

The question whether the jury was properly instructed is one of law over which the appellate court exercises free review. *State v. Bush*, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997); *State v. Cherry*, 139 Idaho 579, 585, 83 P.3d 123, 129 (Ct.App.2003). On appeal, jury instructions are viewed as a whole, not individually, to determine whether the jury was properly and adequately instructed on the applicable law. *State v. Rozajewski*, 130 Idaho 644, 646, 945 P.2d 1390, 1392 (Ct.App.1997).

A jury must be instructed on all matters of law necessary for its information. *State v. Gain*, 140 Idaho 170, 172, 90 P.3d 920, 922 (Ct.App.2004); *State v. Halbesleben*, 139 Idaho 165, 168-69, 75 P.3d 219, 222-23 (Ct.App.2003). This requires that the jury be instructed with respect to all elements of the charged offense. Any omission of an element of a crime lightens the prosecution's burden of proof and is therefore impermissible. *State v. Broadhead*, 139 Idaho 663, 666, 84 P.3d 599, 602 (Ct.App.2004); *Halbesleben*, 139 Idaho at 169, 75 P.3d at 223. To be reversible error, an instruction must mislead the jury or prejudice the defendant. *State v. Hanson*, 130 Idaho 842, 844, 949 P.2d 590, 592 (Ct.App.1997). If a fundamental error has occurred, a new trial is unwarranted only if the fundamental error was harmless. *State v. Field*, 144 Idaho 559, 165 P.3d 273

(2007). The United States Supreme Court has stated that error is not harmless if there is "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 827, 17 L.Ed. 2d 705, 710 (1967).

In *State v. Hansell*, 141 Idaho 587 (Idaho App. 2005), the Idaho Court of Appeals defined the harmless error doctrine in the area of jury instructions. The harmless error analysis may be applied when a court omits an essential element from the instructions to the jury. *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 1836, 144 L.Ed.2d 35, 51 (1999); *State v. Lovelace*, 140 Idaho 73, 79, 90 P.3d 298, 304 (2004). When a jury is not instructed as to an element of an offense, the standard for determining harmlessness is "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19, 119 S.Ct. at 1839, 144 L.Ed.2d at 53. If, after examining the record, the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error ... it should not find the error harmless." cited in *State v. Hansell*, *supra*.

Misleading the jury as to the elements of a crime is proper grounds for reversal in Idaho if it lessens the State's burden of proof, *State v. Lilly*, 142 Idaho 70 122 P.3d 1170 (Idaho App. 2005) or if the omitted element was contested at trial. *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002).

C. Argument.

Applying these standards, the instructions given in this case were misleading as to the proper elements of the crime.

Judge Watkins recognized that the instructions confused and mislead the jury as closing arguments took place. The court stated there was a “decent likelihood that the jury has been misinstructed in this case.” Tr. p. 203. The magistrate recognized the confusion of the jury foreman. Tr. p. 204. The magistrate acknowledged that if there was error, it was “fundamental” if a material element was left out of the instructions. Memorandum Decision at p. 4. But the court did not reverse, holding:

the potential harm in instructing the jury as the court did was that the jury could possibly find that Briggs engaged in acts that caused the required harm, but that such acts were not “nonconsensual contact” as defined by the statute. That harm was not present in this case because **all of the “acts”** that the state alleged, and upon which they presented evidence, fall into the category of “nonconsensual acts.” Memorandum Decision, p. 5.

This decision was erroneous for two reasons: 1) The court did not address the fundamental problem of whether the jury could have convicted based upon anything less than repeated acts of nonconsensual conduct, and; 2) the record is replete with communications that are constitutionally protected.

In the first instance the verdict should be reversed based upon the error in defining the “course of conduct.” The defense contended, and the record supports, the proposition that this case did not constitute a stalking case at all,

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but rather rather a disturbing the peace or an attempted fighting charge between James Dobson, a seventeen year old male, and the defendant. Following a phone conversation with Dobbs, Briggs responded to Dobson's location to challenge him to a fight. Tr. p. 143. It is also undisputed that Briggs' girlfriend, Cassie, was at the trailer at the time that Briggs called Dobson out for a fight and that she was scared. This is the conduct or communication that likely lead to Briggs' conviction and it was based upon the erroneous instruction of defining a "course of conduct.....however short.....evidencing a continuity of purpose."

The prosecutor argued this point precisely in closing and it is likely that the jury could have convicted Briggs of Stalking based solely upon his encounter with Dobbs and Cassie at the trailer. The prosecutor argued:

PROSECUTOR: "Well, what's a course of conduct? Well thankfully we have some definitions. Court of conduct you're going to find out is a pattern of conduct, series of acts over a period of time, however short. In this particular instance, the period of time is alleged as April through June. **But if you think, well, it kind of more or less occurred at the end of May through June 1st, that's fine. You can still find him guilty of that. It just has to have happened on or between April and June, 1st. Okay. Course of conduct, however short, a continued continuity of purpose.** In this particular case the continuity of purpose is, of course, he is trying to find Case. He's making these phone calls, these texts, these messages on various like My Space account type things for a purpose, and that is to find Cassie." Tr. p. 180, ll. 4 -19.

This does not meet the statutory definition of stalking which requires "repeated acts of nonconsensual contact" that is not "constitutionally protected activity." This court should reverse because the record shows that the jury was

mislead could have convicted Briggs based upon a single act of disturbing the peace.

It is important to note that the victim did not testify to receiving any threatening telephone, email or other communications from Briggs as any time after the breakup. Cassie testified that Briggs attempted to contact her using messages, emails, and my space “up to ten times” but the message was that he was worried about her and where she was. Tr. pp. 51-52.

There is no evidence in the record that Briggs was even informed to cease communication with Cassie. Therefore, the June 1, 2009 incident likely formed the basis for the conviction when Briggs arrived at the trailer and yelled to Cassie to “come out and get the phone” [that belonged to her and Briggs]. Tr. p. 60, ll. 14-17. Because the jury was never informed that that “repeated acts of nonconsensual contact” were required, the jury was mislead and the conviction should be overturned.

ARGUMENT

II.

II. The jury instructions were fundamentally flawed depriving Briggs of a fair trial and the protections afforded by the First Amendment of the United States Constitution and the provisions of Article 1, Section 9 of the Idaho Constitution.

A. Introduction.

When a defendant fails to object to a jury instruction, we will still review the jury instruction for fundamental error. *State v. Johnson*, 145 Idaho 970, 977, 188 P.3d 912, 919 (2008); see also *State v. Perry*, 150 Idaho at 224, 245 P.3d at 976 ("If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed . . . under Idaho's fundamental error doctrine."). Before we consider whether there was fundamental error, we must first determine whether the trial court erred at all. *Johnson*, 145 Idaho at 977, 188 P.3d at 919. The *Perry* fundamental error test requires the defendant to show three things: (1) the alleged error violated an unwaived constitutional right; (2) the alleged error plainly exists; and (3) the alleged error was not harmless. *Perry*, 150 Idaho at 228, 245 P.3d at 980.

The question whether the jury was properly instructed is one of law over which the appellate court exercises free review. *State v. Bush*, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997); *State v. Cherry*, 139 Idaho 579, 585, 83 P.3d 123, 129 (Ct.App.2003).

Applying this standard, the first part of the analysis is to determine whether there was error in the instructions. In this case it is clear that Briggs did not request, nor did the court give the jury any instruction as to what activity or speech was "constitutionally protected activity." The jury was never informed as

to protections provided for under the First Amendment or under Article 1, Section 9 of the Idaho Constitution. The jury never understood that Briggs had a fundamental constitutional right to contact Cassie or third parties in a non threatening manner.

B. Standard of Review.

This court outlined the broad protections afforded any citizen in *State v. Poe*, 139 Idaho 885, 88 P.3d 704 (2004):

The First Amendment to the Constitution of the United States protects both actual speech and symbolic or expressive conduct. *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). A statute that punishes only spoken words is facially overbroad if it is susceptible of application to speech that is protected by the First Amendment. *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The overbreadth doctrine has less application, however, to conduct. *Virginia v. Hicks*, 539 U.S. 113, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). In the latter circumstance, the statute will not be held overly broad unless its application to protected speech is substantial, not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications. *Id.* Nonverbal expressive activity can be banned because of the action it entails as long as such ban is unrelated to the ideas it expresses. *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Likewise, reasonable time, place, or manner restrictions on speech may be upheld if they are justified without reference to the content of the speech, and speech may be proscribed based upon a non-content element, such as noise. *Id.* The Supreme Court has permitted restrictions upon the content of speech in **a few limited areas, such as obscenity, defamation, fighting words, true threats, and intimidation**. As it stated in *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83, 112 S.Ct. 2538, 2542-43, 120 L.Ed.2d 305, 317 (1992):

In *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 1548, 155 L.Ed.2d 535, 552 (2003) (citations omitted), the United States

Supreme Court held that true threats are not protected by the First Amendment, nor is intimidation when it is a type of true threat.

"True threats" encompass those statements where the speaker means to communicate **a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals**. The speaker need actually intend to carry out the threat. Rather, a prohibition of true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

C. Argument .

When constitutional analysis is applied, the fundamental error of the jury instructions becomes more clear. Other than the encounter at the trailer, the evidence at trial consisted of improper prosecutorial comment on evidence never admitted, hearsay, and evidence of constitutionally protected activity.

Briggs did object to the introduction to the contents of two emails allegedly written by Briggs. Tr. p. 80 -84. The objection was sustained. Briggs also objected to the contents of My Space postings. Tr. 128-130. This objection was also sustained. Tr. p. 130. Absent this evidence all that is known from the record is the testimony of Cassie that she received "ten messages" Tr. p. 52, l. 18, none of which contained any threats, and her assertion hearsay assertion that Briggs wrote threatening messages to other persons, none of whom testified at trial. Tr. p. 69-70. It is impossible to analyze the content of this speech, because

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there is no record. In fact, Cassie testified that Briggs did **not** call her. Tr. p. 51, ll. 1-3. But that testimony didn't stop the prosecutor from arguing that Briggs "was contacting her by telephone, of course he did.....central to the case." Tr. p. 90, ll. 6-7. An analysis of the record discloses nothing of evidentiary value in terms of a true threat or intimidation.

Other than "fighting words" or "true threats" there is no speech or written word in our society that is not constitutionally protected free speech. The jury should have been informed of the broad protection of the First Amendment and very narrow restriction that can apply in determining what constitutes "constitutionally protected activity" under the Stalking Law. The jury was not informed of the language of the First Amendment in any regard. The error in the instructions plainly exists. Moreover, is nothing in the court record to indicate that Briggs waived the protections of the First Amendment or Article 1, Section 9 of the Idaho Constitution. The first two prongs of the Fundamental Error doctrine outlined in *Perry* are satisfied.

Under the third prong of *Perry*, Briggs must demonstrate that the error was not harmless, meaning that it must have affected the outcome of the trial proceedings. *State v. Perry*, 150 Idaho 209, 226 245 P.3d 961 (2010).

As applied, Christopher Briggs, can demonstrate substantial intrusion into constitutionally protected activity in the pursuit of this criminal conviction.

Christopher Briggs was convicted for conduct that was completely lawful.

Examples in the record of protected activity include:

The GPS Tracking Device. Many cell phones in the united states contains a chip that can be tracked or tracked or traced using cell phone tower triangulation, or in more expensive phones, through GPS tracking. Although the evidence in this case was not detailed, apparently Briggs and his girlfriend Case owned a Sprint phone with such a feature. Tr., p. 43. Cassie testified that Briggs made mention of a feature that allowed him to locate the phone online using some software. Tr., p. 43. That was all. There was no testimony that Briggs was repeatedly tracked Cassie or used the information against her in any way.

Ultimately Briggs' comment was irrelevant or immaterial and without foundation as to a course of conduct designed to threaten or intimidate a victim, but it became the basis for the closing argument. Briggs had a right to mention the tracking feature of the phone and the right to use it if he so desired.

The Gun. Immediately following the testimony regarding the breakup, the prosecuting attorney questioned Cassie about comments made by Briggs as having "access to a gun." Tr. p. 47 ll 12-16. Although Cassie testified that she never saw Briggs with a gun, the suggestion that Briggs was a bad player with a gun calls into question activity that was protected by the Second Amendment of the Constitution. Again, there was no foundation or testimony that Briggs threatened anyone with a gun, only the prejudicial suggestion that he was a

dangerous man with a gun. Once again, Briggs' conviction was obtained by intruding on constitutionally protected activity.

The Emails. There were no emails admitted at trial. Although the prosecution attempted to introduce two emails that the victim brought to court with her (and supposedly from Briggs) the court rejected the evidence. Nonetheless Briggs's conviction was premised upon the idea that he was sending "electronic communications to the victim." The prosecution refers to "emails, the phone calls, the texts, the My Space looking for her" Tr. p. 197, ll. 18-21. The prosecution states that "he sent all kinds of email, six out of seven in just four days or so." Tr. p. 190, ll. 9-12. In the absence of a true threats or intimidation, those emails, were protected speech. The jury did not know this because the jury was not advised as to what constituted protected speech. The jury instructions were fundamentally flawed in this case and deprived Briggs of a fair trial.

Text Messages and My Space Postings. The prosecutor attempted to introduce evidence that Briggs sent text messages to Cassie's friends looking for her, and posting a message on somebody's my space account. No documents or evidence were offered to prove the content of any of these out of court statements. Nonetheless the argument presented itself throughout the trial and in closing argument this conduct or speech was illegal or constituted stalking.

Although the Idaho Stalking Law does not apply to contacts with third parties, at
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a minimum the jury should have been advised that Briggs had a constitutional right to send the nonthreatening text messages. That is exactly what Briggs did according to the two witnesses who testified at trial.

Attempting to contact the victim by phone. The magistrate court ruled that this was a basis for denying the motion for a new trial. There is nothing in any statute that makes it illegal to attempt to contact a person by telephone for any reason other than for the purpose of threatening or intimidating the person. Briggs didn't even do that. Again, there is no evidence in the record that Briggs ever contacted Cassie directly on the phone after the break up.

CONCLUSION

This conviction is seriously flawed. The court should vacate the conviction because the jury was not properly instructed on the critical elements of the crime and the jury was mislead. The court should also vacate the conviction for the reason that the jury instructions did not adequately inform the jury as to constitutional protections afforded to Briggs under the state and federal constitutions.

Respectfully Submitted this 18th day of April, 2012.



Joseph L. Ellsworth

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2012, I mailed a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Idaho Attorney General
Statehouse
Boise, Idaho 83720

A handwritten signature in black ink, appearing to read "Joe Ellsworth", written over a horizontal line.

Joseph L. Ellsworth